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ADDRESS BY CHAIRMAN ROBERT E. HAMPTON, U.S. CIVIL SERVICE COMMISSION, BEFORE THE FEDERAL BAR ASSOCIATION, TOM CLARK AWARD LUNCHEON, AT THE NATIONAL LAWYERS CLUB IN WASHINGTON, D.C., ON MONDAY, MAY 25, 1970.

THE FEDERAL ATTORNEY -- AN AID TO MANAGEMENT

When I was asked if I would address the Bar Association for the Tom Clark Award Luncheon, my initial reaction was to decline. First, I am not a lawyer, but equally important, as most Government lawyers are not in the competitive service, the Civil Service Commission has less to do with their employment than with most Federal employees. But on further thought I recognized how important lawyers are to managers in the executive branch in the area of personnel management; and because of that recognition I am here to share with you some thoughts I feel are particularly pertinent today.

When I speak of the lawyers' importance to management I do not refer to the fact -- long established -- that lawyers are useful in aiding management in the endless variety of Government missions. The Federal lawyer serves every aspect of Government from building roads (for which he obtains rights of way) to shipbuilding and aerospace missions (where his contracting-out ability is without peer). I doubt that many persons take into account that the work of a Government lawyer is so closely related to most executive tasks. He prepares the statutes that authorize the programs we administer; his carefully drafted regulations bring those programs into workable reality; and his advocating in both administrative and judicial tribunals frequently saves us managers from ourselves.

Today, however, I want to stress the importance of the Federal lawyer's aid to proper personnel management. Personnel management deals with PEOPLE -- their hiring; their assignment, training, and motivation; and their removal or retirement. In many aspects of personnel management -- and I have mentioned but a very few -- the lawyer's assistance is needed. Lawyers are experts in dealing with PEOPLE, and indeed, in a fundamental sense, that is what law is all about. It is a "people to people" profession.

From the contacts I have had with Government lawyers, and they are frequent, I am convinced that the more than 9,000 attorneys in the executive branch are both learned and sincerely devoted to their work. In many of the areas of personnel management with which a Government executive deals, the need for sound and prompt legal advice is daily becoming more important. This is particularly so today when dissent is routine and personal rights have a value-standing that is at its highest point in many years.

The need for professional legal advice is evident in many areas of personnel management such as in the new labor-management relations program within the executive branch -- with its various decisional authorities such as the Federal Service Impasses Panel and the Assistant Secretary of Labor for Labor-Management Relations. Lawyers are already very much on the scene in this new program writing regulations and submitting cases for decision. But in one particular personnel area the assistance of the Government lawyer is particularly useful to management. I refer to adverse actions and appeals.

Critics of Government management have frequently voiced the opinion that the rules are so complex that the inefficient and unsuitable employee cannot be removed or appropriately disciplined. First, it is not true that discipline cannot occur. Last year some 12,000 employees were removed, suspended, or otherwise disciplined. More important, however, the rules are not that complicated, and with the professional aid of his staff attorneys, any manager can promptly effect whatever disciplinary action is warranted.

The basic statutes and regulations in the disciplinary area -- all drafted with the aid of lawyers for the purpose of affording administrative due process -- are really common-sense expressions of fair play. An employee must receive a notice of proposed action stating all the reasons for that action, specifically and in detail; he has a double right of answer, both in writing and orally; and he is entitled to a decision expressly indicating the reasons relied upon to support the action to be taken. If a valid cause exists, the legal talent available in Government today can show the personnel manager the proper way to effect the action needed. We as managers earnestly want due process in the area of employee discipline and know it can be secured best with the professional assistance of our lawyers.

In the current climate of protest and dissent, an executive would be foolhardy to fail to avail himself of his lawyer's counsel. The problems involving people and their relationships and their rights and obligations are rapidly becoming the most sensitive and talked-about problems of our time. And the 3 million employees who work in the Federal Government have as much need for legal guidance as the rest of the Nation's population, if not more. The public expects us to handle employee problems fairly and judiciously in the Federal service. Therefore, I say that Federal managers need, more than ever before, the professional interpretation and application of law and court decisions that the Federal lawyer is best able to provide.

To illustrate my point let me sketch a case situation for you that is not entirely hypothetical. A Federal employee wears a peace or anti-war button or insignia on the job. In his immediate office his co-workers are either sympathetic or do not object, but there are others in adjacent offices where the employee's duties require him to go who are extremely disturbed by the button-wearing. In fact their disturbance goes beyond proper objection on their part and into what may only be termed misconduct. The manager is truly the man in the middle. If he orders the employee to take off the button -- the wearing of which is certainly deserving of some constitutional protection -- he is faced with the possibility that others may sympathize with the button-wearer and begin their own button-wearing. If he does nothing about the button-wearer he faces a work-site disruption that will interfere with the efficient performance of his agency's work.

Indeed, the button protestors claim First Amendment rights in registering their objection to the wearing. There are constitutional balances here that need a lawyer's attention. Since I have already told you that this is a lawyer's problem, I, a non-lawyer, will not attempt to answer it for you. All I want to make clear is that the situation today is ripe for challenges of this type. Challenges that may well end up in court so that the manager's action must, from the outset, recognize the legal facets involved, and his decision must be legally defensible.

I feel that you as Government attorneys, regardless of your particular legal area of specialization, would do well to keep up with the law of personnel administration so that when a manager needs your professional advice you are ready to give it. Perhaps I can motivate your interest in this legal field by sketching for you some of the Commission's legal philosophy which has developed over the years, and some of the mechanics of operating a merit system and judging the fitness of applicants and employees.

The matter of employee fitness, and particularly the legal aspects of it, have been much in the public eye in recent months and weeks. In some quarters it has become fashionable to reincarnate the specter of "Big Brother" peering over every man's shoulder and keeping voluminous dossiers, or worse, highly efficient computerized data banks, filled with assorted bits of gossip with which to disqualify the innocent. There has been talk of "puritanical" standards of morality, of keyhole peeping, and of regularized invasions of privacy. Some have tried to create the impression that any participation in a campus demonstration, no matter how peaceful, provides an automatic basis for disqualification for Government employment. Through it all there are dire pronouncements about new, drastic, arbitrary suitability standards being adopted by the Commission. The innuendo is not new. It certainly is not true.

The simple truth is that the Commission has no new standards of fitness for Federal employment. Our present suitability disqualifications have been in effect for years. In essence they are designed to fulfill two fundamental but interrelated aims: (1) To maintain the efficiency of the service, and (2) to maintain public confidence in the integrity of its civil servants.

These aims are deeply rooted in our Nation's history. George Washington emphasized honesty and efficiency as paramount considerations in selecting appointees. Later, the glaring scandals and inefficiencies of the spoils system during the mid-1800's underscored the imperative need to restore public confidence in the integrity of the Government. This was a major influence in the passage of the Civil Service Act of 1883 with its emphasis on capacity and fitness.

As the civil service system grew in size and stature, the principle of removals "only for such cause as will promote the efficiency of the service" became firmly established--in the Lloyd-LaFollette Act of 1912, and again in the Veterans' Preference Act of 1944.

Efficiency . . . public confidence . . . integrity . . . these are the unchanging foundations of our time-tested standards. They have served us well, and continue to do so as we apply them to the problems presented by today's social climate. In what sense are the problems new? They are new not because human nature has changed significantly, but because the social climate in which we function has changed and will continue to change. Public attitudes today are more tolerant of some forms of human behavior.

A growing body of court decisions has interpreted the constitutional rights of all citizens more broadly than ever before. Public and congressional concern is more and more on the side of safeguarding the interests of the individual in any action at the hands of the Government. Investigative processes are increasingly and properly subjected to critical attention. Decisions that may have been taken for granted a decade ago must now not only bear closer administrative scrutiny but must stand up in a judicial review after attack by alert and informed private attorneys.

All this is right and proper. Managers must not operate in a vacuum. We know that a prime requisite of Government is to be responsive to the needs and interests of its citizens. And we must constantly appraise what we do, why we do it, and how it is done. Such an appraisal obviously involves as much consideration of the law involved as the policies needed.

Of particular interest today is the legal position of the executive branch with respect to a person's involvement in public protest demonstrations. The First Amendment implications of this matter are obvious even to the layman. With the help of our lawyers the Commission has spelled out our recognition that employees, like all other citizens, are protected in their constitutional right to express their views, to assemble, and to petition for change. In some narrow and relatively infrequent situations we believe the employee of the Government must refrain from attacking superiors with whom he has a close working relationship and the programs which he is required to administer. To the best of my knowledge no serious objection has been raised by anyone to those narrow restrictions.

The same rules apply to prospective appointees. If the protest is constitutionally permissible, the protest action is not disqualifying for appointment in the Government. If the protest action, however, extends beyond the law so that the legal rights of others are invaded by violence or serious disorder, the action may be disqualifying. I say may because we recognize no automatic disqualification. In every such case there are several factors that are always considered. The age of the applicant when the event occurred; the surrounding conditions and social climate; the time that has elapsed since the event; and, most importantly, whether there is evidence of what we might call rehabilitation. Each case is judged on its own set of facts with full attention to the legal aspects involved.

Please do not interpret my last remark as an assurance that every Commission suitability decision is guaranteed against judicial reversal. While I admire and respect the legal professionals on our staff I, like every manager, recognize that no attorney can guarantee that his professional opinion will find agreement within the judiciary.

The Commission does not consider itself to be the guardian of the public's morals, and is not "puritanical" in its attitudes on moral fitness. Our main concern in deciding cases involving alleged immoral conduct is to determine whether or not whatever conduct is established is such as to render the applicant, in the minds of reasonable people, unfit for Federal employment.

The Commission looks at each of these cases in the light of today's public attitudes on morality, not those of the distant past. We consider the extent to which the individual's conduct indicates a gross or flagrant abuse of generally accepted standards of moral conduct and would be truly offensive to the sensibilities of the average person; the extent to which the individual's conduct may bring serious discredit to the service and would impair its efficiency; and whether the immorality represents a few isolated occurrences compared to a pattern of flagrant abuses of generally acceptable moral standards.

I would be less than candid if I did not at this point admit that recent decisions by the courts have caused us to reappraise our application of the regulation concerning immoral conduct. And in doing so we act with the help of our lawyers and with the firm belief that their professional guidance will lead us to an application of our standard that will concurrently recognize the employee's right of privacy and the Government's obligation to the public it serves to exclude the truly unfit from Federal employment.

In this sensitive area of judging moral conduct, we are at present somewhat torn by differing judicial viewpoints. Some courts have held it essential that a positive nexus be shown between the established immoral conduct and the employee's performance of his particular job tasks. On the other hand we have a most respectable decision that a job or task-related nexus is unnecessary; that if the misconduct will bring the employing agency into public disrepute so that there is a real likelihood that there will be interference with the accomplishment of its mission, then the statutory requirement of the promotion of the efficiency of the service is met and the separation of the employee is proper. Obviously, here is a fertile field in which Government lawyers can aid management.

Recent newspaper reports on the so-called loyalty oath decisions have created an impression among a significant part of the public that loyalty standards for Government employees have been revoked, and that our doors are open to avowed Communists and persons actively seeking the overthrow of our constitutional Government by force or violence. I want to assure anyone concerned that the suitability factor of loyalty to our Government is not extinct. No single employee suitability element causes more concern among our citizens than the loyalty element. The idea that Federal employees may not be required to be loyal to the Government they serve truly shocks the public. Because of the high public interest about this element, managers have a special need to obtain the best legal advice available whenever a personnel action in any way is affected by the issue of loyalty.

Closely related to the loyalty element is the matter of the so-called Government "blacklist." The erroneous concept exists that the Commission and other executive agencies maintain a blacklist which names individuals rated unfit for appointment on the basis of unevaluated items of information clipped from newspapers or drawn from other sources. We not only do not have such a list; we have never had one and never intend to have one. Like any organization that is efficiently organized, our Bureau of Personnel Investigations maintains security files. It has done so since World War II. There is information in those files from a variety of sources. Some of that information is "raw" or unevaluated, some is fully evaluated, but none of it is used by itself to disqualify anyone. Files of a similar nature are frequently used by business concerns to enable them to make adequate inquiries to determine a credit rating.

All the files do is give us leads which may result in investigations. If an investigation raises a reasonable doubt as to an applicant's suitability, he is informed of the evidence against him and given an opportunity to refute or explain it. He may be assisted by his own counsel in that refutation or explanation. Only after his side of the matter is evaluated, together with the rest of the case, is a decision made. I feel our practices are reasonable and fair and supply the due process to which our applicants are entitled. Although we have lost cases on the merits in the courts, no court has yet found the procedures I have just described to be lacking in due process.

Returning to my opening thought, I want to emphasize that there are many situations and processes in personnel management in which the Federal manager (as the saying goes) "needs a good lawyer." Every Federal agency <u>has</u> good lawyers -- some of the very best in the country -- but it is my impression that they are not being used to advise on personnel management matters to the extent they should be. Perhaps that is a weakness on the part of management and, if so, as professionals you should remind them of your availability to aid them. Obviously your first obligation is to be expert in your agency's particular field, but I urge that you devote some of your time to keeping abreast of personnel law, particularly in the areas in which the constitutional rights of employees are involved, so that the managers can call and rely upon your legal advice.

In my position I have seen too many cases in which attention to applicable procedures and employee rights has been neglected because of a lack of true professional application of legal requirements and obligations. Almost every aspect of Federal personnel administration is governed by statute, case law, Executive orders, and regulations. A failure to follow these requirements is not only unfair to the employee concerned, it is offensive to proper personnel management principles. You as lawyers can go far in preventing such failures.

There is another side of the coin about which my associates in administrative positions are deeply concerned. Administrators are generally quite alert to the strictures and constraints placed on their actions by law and regulation. They try to live by the rules but feel that at times some lawyers who serve them fail to recognize that there is a need for balance. Within the executive branch we deal with a tremendous work force and a complex variety of problems. This means that the overall management of that work force is, in itself, a major governmental mission. The lawyer who undertakes to advise a manager or administrator should make a proper effort to help him and should not over-interpret the law and regulations so as to penalize the legitimate and effective accomplishment of the management mission.

I hope you will consider the aid that Government lawyers can give in the area of personnel management a challenge worth taking up. All of us -- Government managers and Government lawyers and the employees concerned -- will profit from your assistance.

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